2019 ADVANCED DUI TRIAL ADVOCACY

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ETHICS

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State Bar of Arizona Ethics Opinions

01-13: Criminal Representation; Confidentiality; Witnesses; Discovery 11/2001

Prosecutors ethically may reveal substance of discussions with law enforcement witnesses; such discussions are not considered "client confidences" under ER 1.6.

FACTS[1]

The County Attorney has conducted pre-trial interviews with potential law enforcement witnesses. Defense counsel has sought disclosure of all "discussions" between law enforcement trial witnesses and the County Attorney's Office.

QUESTION PRESENTED

Whether a prosecutor may reveal the substance of discussions with law enforcement witnesses or whether that information may not be revealed as a client confidence under ER 1.6.[2]

RELEVANT ETHICAL RULES

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(2).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

ER 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6.

RELEVANT ARIZONA ETHICS OPINION

Ariz. Op. 94-07

OPINION

In order to analyze whether discussions with law enforcement officials constitute client confidential information, it is first necessary to determine who is considered "the client" for purposes of ER 1.6. As stated by a leading commentator:

> The office of prosecutor can best be conceptualized as a lawyer with no client but with several important constituencies. *The police are an important constituency, although for most purposes individual police officers with whom the prosecutor holds confidential meetings are not the lawyer's client.* Victims of crime are also clearly not clients . . . The emotionally satisfying statement is that the client of every prosecutor is the public. A less emotive but more realistic conceptualization is that prosecutors in a position to make policy decisions should regard the public as their client, while prosecutors in subordinate roles should regard their superiors in the office as the effective client for matters on which office policy has been set or specific directions given, unless a superior directs a subordinate lawyer to violate the law or the professional rules. (emphasis added)

C. Wolfram, *Modern Legal Ethics* § 13.10.1. *See also, e.g., Smith v. State*, 465 N.E.2d 1105, 1119 (Ind. 1984) ("The State is the client of the prosecutor. The prosecuting witnesses, including police officers, are not parties in a prosecution and no attorney-client relationship arises between a prosecutor and a police officer who may be a witness in a criminal trial."); Restatement of the Law Governing Lawyers §§ 96, 97. The same analysis applies here. The law enforcement officials are not the prosecutor's client. Therefore, the substance of discussions between a prosecutor and law enforcement officials are not client confidences under ER 1.6.

This conclusion is also reinforced by a prior analogous ethics opinion, and the unique role that prosecuting attorneys play in our society. Arizona Opinion 94-07 analyzed a prosecutor's duty to disclose certain potential exculpatory information. The obligation to produce such information is codified in ER 3.8. In accordance with ERs 3.8 and 8.4, the Committee held a prosecutor has an obligation to notify defense counsel of the death of an officer who had testified before the grand jury. The Committee also found that in a case involving possession of a narcotic, a prosecutor must inform defense counsel while a plea offer was under consideration that evidence seized pursuant to a search warrant had been inadvertently destroyed. Finally, the Committee held that in a case involving driving under the influence of drugs a prosecutor must inform defense counsel of the lack of a urine sample for the defense to conduct an independent urine test. Thus, in all three scenarios presented the Committee felt disclosure was appropriate, consistent with the case law cited in the Opinion which noted that the obligation to disclose includes information used only to impeach government witnesses, and that courts have cautioned prosecutors to resolve doubtful questions in favor of disclosure.
Whether the substance of the discussions in this case could be potentially viewed as exculpatory is not evident from the request. To the extent a prosecutor learns of evidence or information that tends to negate guilt or mitigates the offense charged, however, a prosecutor has an obligation of disclosure under ER 3.8.

CONCLUSION

A prosecutor may ethically reveal the substance of discussions between law enforcement officials and members of the prosecutor's office, and has an absolute obligation to reveal

evidence or information if it tends to negate the guilt of the accused or mitigate the offense. Such discussions are not considered client confidences under ER 1.6.

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[1] **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2001**

[2] This Opinion is limited only to whether there is an ethical prohibition from revealing these discussions, and not whether any such request is proper under the Arizona Federal Rules of Criminal Procedure. Any interpretation of the discovery rules is beyond the scope of this Opinion and the purview of this Committee.

State Bar of Arizona Ethics Opinions

94-07: Prosecutor's Duties; Candor 3/1994

Opinion discusses the duties of a prosecutor to disclose exculpatory information to defense in the context of three scenarios. Reference is made to the constitutional issues.

FACTS

The inquiring attorney is a Deputy Maricopa County Attorney who has requested that the committee resolve a "heated debate" among prosecutors within his office regarding the prosecutor's duty to disclose "exculpatory" information.

The prosecutors have grappled with the contours of their obligation, specifically whether the rule requiring disclosure is limited to evidence which clearly tends to show that the defendant is not guilty, or whether it extends to what has been characterized as mere "problems of proof".

To place the debate in perspective, the inquiring attorney requests the committee to answer the above question through three scenarios which he poses as follows:

1. The defendant is charged with aggravated Driving While Under the Influence, a class 5 felony. The arresting officer observed the defendant's driving, administered field sobriety tests, and administered the breath test. The arresting officer testified at the preliminary hearing and a record was made of his testimony. Soon thereafter, he passed away. The Deputy County Attorney offered the defendant a stipulated sentence prior to the officer's passing. The defendant is contemplating whether to take the offer or proceed to trial. Must the Deputy County Attorney disclose the fact that the officer passed away? If so, when?

2. The defendant is charged with Possession of Narcotic Drugs for Sale arising from a 1989 search warrant. The Deputy County Attorney makes an offer to a stipulated sentence then learns that the drugs were inadvertently destroyed in 1990 by the police department during relocation of its property room. The defendant is contemplating whether to take the offer or proceed to trial. The State could, if necessary, proceed to trial with only testimony and lab reports. Must the prosecutor disclose the fact that the drugs were destroyed? If so, when?

3. The defendant is charged with Driving While Under the Influence of Drugs, a class 1 misdemeanor. One key piece of evidence is a urine sample given to the police by the defendant on the night of the arrest pursuant to compliance with the Implied Consent law. The urine sample tested positive for methamphetamine. All of the sample, however, was consumed in testing leaving no portion for an independent test by defense counsel.

The State may have sufficient evidence to proceed to trial even if there were no urine sample. The defendant has made no Motion for Discovery. Must the prosecutor disclose the fact that all of the urine sample was consumed in testing? If so, when?

ETHICAL RULES INVOLVED

ER 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

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(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

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ER 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

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(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

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ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

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(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

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OPINION

A. General Overview

The Supreme Court of the United States has determined that the due process right to a fair trial mandates that the prosecution disclose information favorable to the defendant that is material to either guilt or punishment. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976); Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Evidence is "material" when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). The Brady obligation extends not only to purely exculpatory information, but also to information that could be used to impeach government witnesses. For example, nondisclosure of a grant of immunity to a witness who testifies against a criminal defendant violates due process because witness credibility is at issue. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972). Finally, because these questions can be difficult, the courts have cautioned prosecutors to resolve doubtful questions in favor of disclosure. Brady v. Maryland, supra; State v. Jones, 120 Ariz. 556, 560, 587 P.2d 742, 746 (1978).

The A.B.A. ethical codes have long recognized a similar obligation on the part of the prosecution to disclose information favorable to the defendant.[1] DR 7-103(B) of the Model Code of Professional Responsibility specifically required that prosecutors "make timely disclosure to counsel for the defendant... of the existence of evidence... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."[2] The current provision of the Arizona Rules of Professional Conduct, ER 3.8(d), expands this requirement by mandating disclosure not only of the "existence" of favorable evidence, but of the evidence itself.[3] In addition, the current rule requires

disclosure of "evidence or information that tends to negate guilt" thus making it clear that the admissibility of Brady material is irrelevant. Finally, the current rule specifically provides that the prosecution may seek a ruling from the court as to its disclosure obligations.

Brady obligations cannot be decided in a vacuum but must be considered in the context of the jurisdiction's criminal discovery rules. In Arizona, the Rules of Criminal Procedure contain especially broad requirements for disclosure by the prosecution. Rule 15.1(a) (7) essentially tracks the language of ER 3.8(d) by requiring that the prosecutor disclose the following no later than 10 days after arraignment in Superior Court:

> All material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefor, including all prior felony convictions of witnesses whom the prosecutor expects to call at trial.

Other portions of this rule require disclosure at the same time, inter alia, of the names and addresses (except victims) of all prosecution witnesses to be called in the case-in-chief, Rule 15.1(a)(1), a list of all documents or tangible evidence to be used at trial, Rule 15.1(a)(4), and the names and addresses of experts who have examined any evidence in the case, Rule 15.1(a) (3). Upon written request, the prosecutor is required to "make available to the defendant for examination, testing and reproduction any specified items contained in the list [of documents and tangible objects]." Rule 15.1(c). These broad disclosures by the State trigger equally broad disclosure requirements on the defendant. See Rule 15.2, Ariz. R. Crim. P. Both sides have a continuing duty to disclose additional information or material covered by the rules. See Rule 15.6, Ariz. R. Crim. P.

B. Discussion of the Scenarios

SCENARIO #1

> The defendant is charged with Aggravated Driving While Under the Influence, a class 5 felony. The arresting officer observed the defendant's driving, administered field sobriety tests, and administered the breath test. The arresting officer testified at the preliminary hearing and a record was made of his testimony. Soon thereafter, he passed away. The Deputy County Attorney offered the defendant a stipulated sentence prior to the officer's passing. The defendant is contemplating whether to take the offer or proceed to trial. Must the Deputy County Attorney disclose the fact that the officer passed away? If so, when?

Authorities have held that, where a witness furnished sworn testimony at a preliminary hearing and was subjected to cross examination, use of the transcript was permissible at a trial held after the witness had expired. James v. Wainwright, 680 F.2d 102 (llth Cir. 1982); Morrow v. Wyrick, 646 F.2d 1229 (8th Cir. 1981). Admission of the transcript is not allowed in every case, however, and objections can be made for a variety of reasons including that the cross examination conducted was not "the equivalent of significant cross-examination". Id. 646 F.2d at 1233.

While disclosure of the death of the officer may be required under ER 3.8(d), it is not necessary to reach that question in this scenario. Given the requirement of Rule 15.1(a) (1), Ariz. R. Crim. P., that the names of all witnesses be disclosed, the prosecutor would have an obligation to tell the defense lawyer that the officer will not be a witness or to correct any previous listing of the officer as a witness. ER 3.4(c) prohibits a lawyer from "knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." As this committee has recognized when dealing with a criminal defense attorney's duty to turn over physical evidence of the crime which comes into his possession, "If a legal obligation attaches, the attorney is ethically required to obey the law." Opinion No. 85-4 (March 14, 1985) at p. 6. See also Hitch v. Superior Court, 146 Ariz. 588, 708 P.2d 72 (1985).

The prosecutor has a legal obligation to inform the defendant of all witnesses to be called in the case-in-chief. If the officer has been listed, then the prosecutor has an obligation to notify the defense lawyer that the officer will no longer be a witness. To do otherwise would be to deceive and mislead the defendant and be prejudicial to the administration of justice. ER 8.4(c) and (d). This disclosure should be made as soon as the prosecutor learns of the unavailability of this witness, and certainly before the defendant is asked to respond to the plea offer. See Virginia State Bar Ethics Opinion 1477, Law. Man. On Prof. Conduct (ABA/BNA) p. 1001:8713 (8/24/92) (lawyer who learns that client's answers to interrogatories were false may not attempt to effectuate settlement before answers are corrected).

SCENARIO #2

> The defendant is charged with Possession of Narcotic Drugs for Sale arising from a 1989 search warrant. The Deputy County Attorney makes an offer to stipulated sentence then learns that the drugs were inadvertently destroyed in 1990 by the police department during relocation of its property room. The defendant is contemplating whether to take the offer or proceed to trial. The State could, if necessary, proceed to trial with only testimony and lab reports. Must the prosecutor disclose the fact that the drugs were destroyed? If so, when?

According to the Supreme Court of the United States in Arizona v. Youngblood, 488 U. S. 51, 109 S. Ct. 333 (1988), the failure of the government to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," is not a denial of due process of law "unless a criminal defendant can show bad faith on the part of" the government. Id. 488 U.S. at 57-58, 109 S. Ct. at 337. See, also, State v. Youngblood, 173 Ariz. 502, 844 P.2d 1152 (1993).

Again, it is unnecessary to decide whether disclosure is required under ER 3.8(d) because disclosure must be made under ER 3.4. The drugs in this case likely were listed as tangible evidence under Rule 15.1(a) (4). Now that the prosecutor has learned that this evidence has been destroyed, he is under an obligation to correct the Rule 15.1 disclosure. This correction must be accomplished as soon as

possible after the prosecutor learns of the destruction. Certainly, it must be done before any response is made by the defendant to the plea offer, as otherwise the defendant would be misled as to the strength of the State's case. ER 8.4(c) and (d).

SCENARIO #3

> The defendant is charged with Driving While Under the Influence of Drugs, a class 1 misdemeanor. One key piece of evidence is a urine sample given to the police by the defendant on the night of the arrest pursuant to compliance with the Implied Consent law. The urine sample tested positive for methamphetamine. All of the sample, however, was consumed in testing leaving no portion for an independent test by defense counsel. The State may have sufficient evidence to proceed to trial even if there were no urine sample. The defendant has made no Motion for Discovery. Must the prosecutor disclose the fact that all of the urine sample was consumed in testing? If so, when?

In this case, the Rule 15.1(a) (4) requirement of a list of all tangible evidence may not include the urine sample. If it does, then, of course, the same analysis stated above would apply and disclosure is required. Most likely, however, the prosecution has simply disclosed a report of the urine test which apparently does not reveal the destruction of the urine sample.

The inquiring attorney reports that no "Motion for Discovery" has been made. The defendant would have a right to production of the urine for retesting under Rule 15.1(c), but must make a written request for it. Had he done so, there would be no question that disclosure is required.

Generally, the due process clause of the Federal Constitution does not require preservation of breath samples in DUI cases in order to introduce results of breath-analysis tests at trial. California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528 (1984). The Arizona Supreme Court, however, applying the due process clause of the State Constitution, has held that such preservation of breath samples is necessary. State ex rel. Dean v. City Court, 163 Ariz. 510, 789 P.2d 180 (1990); Baca v. Smith, 124 Ariz. 353, 604 P.2d 617 (1979). It has also held that due process requires that a defendant be advised of his right to an independent test because of the "inherently evanescent" quality of breath evidence. Montano v. Superior Court, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986). This rule was not extended to blood tests because a sufficient supply of blood was available for retesting. State v. Kemp, 168 Ariz. 334, 336, 813 P.2d 315, 317 (1991). Thus, the lack of a sufficient urine sample for retesting in this case could give rise to a motion to suppress the State's test results or a motion to dismiss for a due process violation.

Moreover, the failure to preserve any urine sample for retesting would most certainly give rise to a defense request for an instruction to the jury under State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964). That instruction states as follows:

> If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.[4]

Recommended Arizona Jury Instructions, Standard Criminal 11 (1989).

The Arizona Supreme Court has continually affirmed the necessity of a Willits instruction in cases of failure of the State to preserve evidence, even where due process would not itself require such preservation. See Youngblood, 173 Ariz. at 506-507, 844 P.2d at 1156-1157.

The laws governing DUI prosecutions are extremely complex and changing. See A.R.S. §§ 28-691, et seq. Whether those laws themselves may require disclosure of the unavailability of a urine sample for retesting is beyond the scope of this opinion. If they do, then ER 3.4 clearly requires that the prosecutor disclose that fact. Nevertheless, it appears to the committee that the lack of such evidence is sufficiently exculpatory under the law cited above to call for disclosure under ER 3.8(d). Again, this disclosure must be made in a timely manner so that the defendant may use it in the preparation of the case and in responding to any plea offers.

DISSENT

One member of the committee, in dissent, wrote:

I believe we have gotten off course in speculating on the law in connection with Arizona Rule of Criminal Procedure 15, but that is not what has compelled me to dissent.

The issue which is of considerable concern to me is the proposal that Ethical Rule 3.8(d) is not coextensive with the Constitution. Such an opinion would confer greater rights to defendants than the Constitution does and has the effect of creating a super-exclusionary rule. It would be elevating the opinions of this committee and the Ethical Rules above decisions of the Supreme Court of Arizona and the Supreme Court of the United States, with the power to create substantive rights for defendants not existing in the Constitution. This is not within the province of this committee; and it may well be a violation of the separation of powers doctrine of the Constitution (See, U.S. v. Simpson, 927 F.2d 1088, 1090-1091 (9th Cir. 1991)); and a violation of the Supremacy Clause of the United States Constitution if applied to federal prosecutors. See, Baylson v. Disciplinary Board of Supreme Court of Pa., 975 F.2d 102, 111-113 (3rd Cir. 1992).

Additionally, the practical realities should be considered. What better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint? This weapon is certainly more effective than the existing exclusionary rule which merely excludes inadmissible evidence. One might expect that such an opinion would be used as a weapon by defense counsel to threaten that

the government must now open its entire file despite the fact that the Constitution, as interpreted by the Arizona and United States Supreme Courts, does not require such a result. Prosecutors will be chilled by the thought of defending a bar complaint to the detriment of law enforcement.

As the Supreme Court of the United States, in establishing the requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), stated in United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985):

> An interpretation of Brady to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." [Citation omitted.] Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interests in the finality of judgments.

105 S. Ct. at 3380, n.7.

What is more, such open discovery provides the possibility of subornation of perjury, harassment and witness tampering. Many witnesses in criminal investigations involving public and organized crime figures would never cooperate if they knew their information would be prematurely disclosed.

This opinion does violence to well-established constitutional law, and creates adverse consequences to law enforcement. Therefore, I dissent.

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[1] This ethical duty predates the Supreme Court's application of the due process clause to prosecutorial disclosure. See R. Rosen, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," 65 N.C.L. Rev. 693 (1987).

[2] The Comment to DR 7-103(B) makes it clear that the omission of a "materiality" requirement gives it broader application than the Brady due process standard:

> . . . DR 7-103(B) does not limit the prosecutor's ethical duty to disclose to situations in which the defendant requests disclosure. Nor does it impose a restrictive view of "materiality." DR 7-103(B) states that the prosecutor has a duty to make a timely disclosure of any evidence that tends to negate guilt, mitigate the degree of the offense, or reduce the

> punishment. It appears possible, therefore, that a prosecutor may comply with the constitutional standards set forth in Brady and Agurs and Still be in violation of DR 7-103 (B)....

American Bar Foundation, Annotated. Code of Professional Responsibility, Comment to DR 7-103(B) at pp. 330-331(1979).

[3] The A.B.A. Comments to Rule 3.8(d) reaffirm that the ethical duty to disclose is broader than the constitutional due process obligation:

> A prosecutor's ethical obligation, though derived from constitutional mandates, seeks to preserve public confidence in the prosecution function as well as to avoid constitutionally significant harm to the defendant. Thus, Rule 3.8(d) requires disclosure of all information that may tend to negate the defendant's guilt, mitigate the offense, or reduce punishment.
>
> The ethical duty therefore, requires disclosure beyond that which may be material under the Bagley standard ...

A.B.A. Annotated Model Rules of Professional Conduct (2nd ed., 1992), Rule 3.8(d), Comment at p. 408.

[4] The Note to this instruction clearly establishes its applicability to this situation:

> A defendant is entitled to a Willits instruction upon evidence that (1) the State failed to preserve material evidence that was accessible and might have tended to exonerate him, and (2) there is resulting prejudice to defendant. Thus, where the State placed reliance on evidence such as blood, its duty of preservation becomes increasingly important, and if the State then refers to this lost evidence to support guilt, the defendant is prejudiced to the point where failure to give this instruction is reversible error. [Id. at p. 11]

State Bar of Arizona Ethics Opinions

02-05: Conflict of Interest; Former Government Lawyers; Administrative Proceedings; Imputed Disqualification; Screening

9/2002

This Opinion discusses the general conflict analysis for government lawyers switching to private practice that may involve representing private clients against the lawyer's former government agency.

FACTS[1]

The inquiring attorney recently left the Attorney General's Office to join a private law firm that represents clients before various state agencies. While employed by the Attorney General's Office, the inquiring attorney represented several state agencies in regulatory and administrative law matters. The inquiring attorney anticipates being asked to represent clients whose interests are adverse to a state agency the inquiring attorney represented while with the Attorney General's Office, as well as clients whose interests are adverse to individuals or entities who were involved in administrative proceedings in which the inquiring attorney took part while employed by the Attorney General's Office. The inquiring attorney seeks general guidance about whether it is ethically permissible to represent such clients.

QUESTION PRESENTED

Under what circumstances may a former government lawyer represent clients in matters involving a government agency the lawyer formerly represented?

RELEVANT ETHICAL RULES

ER 1.7. Conflict of Interest: General Rule

* * * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely

affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

ER 1.9. Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

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(b) use information relating to the representation to the disadvantage of the former client except as ER 1.6 would permit with respect to a client or when the information has become generally known.

ER 1.11. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

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(d) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Op. 85-6
Ariz. Op. 89-04
Ariz. Op. 89-08
Ariz. Op. 93-07

OPINION

A former government lawyer's conflict of interest obligations are generally found in ER 1.11. *See* ABA Formal Ethics Op. 97-409 (concluding that ER 1.11 supplants, rather than supplements, ER 1.9(a), although ER 1.9(b) remains applicable to former government lawyers); *cf.* 1 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 15.4 at 15-13, 15-14 (3rd ed. 2000) (arguing that a former government lawyer's conflict of interest obligations should be analyzed under both ER 1.9(a) and ER 1.11(a)).[2] The purpose of ER 1.11 is to "prevent[] a lawyer from exploiting public office for the advantage of a private client." ER 1.11 Comment; *see also Security General Life Ins. Co. v. Superior Court,* 149 Ariz. 332, 334, 718 P.2d 985, 987 (1986) ("This rule is intended to prevent conflicts of interest that arise in the 'revolving door' between government and private practice.").

Ethical Rule 1.11(a) prohibits a former government lawyer from personally "represent[ing] a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation." Because the purpose of the Rule is to prevent exploitation of government office, "there is no requirement that the [private] representation be adverse to the government or its interests, as there is in other conflicts of interest rules; *even representation congruent to the interests of the former client is banned, absent consent by the government.*" Hazard & Hodes, *supra* § 15.4 at 15-11—15-12 (emphasis in original).

"Matter" is defined in ER 1.11(d) as including "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties." That definition codifies the definition given in ABA Formal Op. 342, which defined the term as:

> contemplat[ing] a discrete and isolatable transaction or set of transactions between identifiable parties (footnote omitted). Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. . . . By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer . . . from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties (footnote omitted).

ABA Formal Op. 342 (1975), *quoted in* Hazard & Hodes, *supra* § 15.5 at 15-15.

To have participated "personally and substantially" in a matter, a government lawyer must have "become personally involved to a material degree in the investigative or deliberative process regarding the transactions in question." *Security General,* 149 Ariz. at 334, 718 P.2d at 987 (citing ABA Formal Op. 342).[3]

Conflicts under ER 1.11(a) may be waived by a government agency, subject to statutory or regulatory restrictions. ER 1.11(a). It is the former government lawyer's duty to determine the individual or entity authorized to give informed consent on behalf of a governmental entity. In most cases, the appropriate individual will be the chief legal officer for the governmental entity - e.g., the Attorney General, county attorney or city attorney - as opposed to an agency head or managerial-level employee.

If a former government lawyer is barred by ER 1.11(a) from personally representing a client and the conflict has not been waived, that conflict is not imputed to lawyers in the former government lawyer's firm. *Id.* The firm may represent the client so long as the former government lawyer is "screened from any participation in the matter and is apportioned no part of the fee therefrom" and "written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule." *Id.[4]*

In addition to considering whether he or she was "personally and substantially" involved in the same "matter" for which a new client seeks representation, the former government lawyer must consider whether ER 1.11(b) applies. ER 1.11(b) precludes a former government lawyer who acquired "confidential government information about a person" while employed by the government from representing "a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." ER 1.11(b).

"Confidential government information" is defined narrowly in ER 1.11(e) as information (*i*) "which has been obtained under governmental authority," (*ii*) "which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose," and (*iii*) "which is not otherwise available to the public." Moreover, ER 1.11(b) "operates only when the lawyer is [sic] question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer." ER 1.11 Comment. In short, "if the [former] government lawyer does not have information about a particular party *that she learned only because of her position in the government,* Rule 1.11(b) should not apply." Hazard & Hodes, *supra* § 1.7 at 15-22 (emphasis in original).

Unlike conflicts under ER 1.11(a), a conflict under ER 1.11(b) is not waivable. *Annotated Model Rules of Professional Conduct* at 182. If a former government lawyer has a conflict under ER 1.11(b), the conflict is not imputed to his or her firm so long as the former government lawyer is screened in accordance with ER 1.11(a). *Id.*

The last question that a former government lawyer must address in deciding whether to represent a private client on matters involving a governmental entity he or she formerly represented is whether ER 1.9(b), which prohibits a lawyer from "us[ing] information relating to the representation [of a former client] to the disadvantage of the former client except as ER 1.6 would permit," precludes the lawyer from taking on the new representation. As the ABA's Standing Committee on Ethics and Professional Responsibility explained in Formal Op. 97-409, a former government lawyer representing clients against a government agency he or she formerly represented may be subject to disqualification if, in the new representation, he or she would be required to use or reveal confidences of his or her former government client.

> Although Rule 1.9(c)[5]does not provide for automatic disqualification by virtue of a lawyer's prior representational activities, its restrictions on the use or disclosure of a former client's confidences may effectively disable a lawyer from undertaking a new representation under certain circumstances (footnote omitted). If a lawyer has information relating to the prior representation of her government client that would necessarily be used or revealed in a new client's cause, but which her former client will not allow her to use or reveal, her obligations to her former client under Rule 1.9(c) would almost certainly be deemed to "materially limit" her representation of the new client under Rule 1.7(b). Not only could her inability to use or reveal her former government client's confidences compromise her competence and zeal in the new representation, but she would be subject to a disqualification motion by her former government client based on her knowledge of its confidences.

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> Accordingly, the lawyer could not undertake the new representation unless the former government client consented to waive the confidentiality barrier posed by Rule 1.9(c).

Formal Op. 97-409, *quoted in ABA/BNA Lawyers' Manual on Professional Conduct, Ethics Opinions 1996-2000* at 1101:157. While not defining what "information relating to the representation" might trigger a former government lawyer's obligation under ER 1.9(b), the Opinion noted that "general knowledge of policies and practices of her former agency, gained through employment by or representation of that agency," would ordinarily not be considered disqualifying under ER 1.9(b). *Id.* at 1101:157 n. 17.

If a former government lawyer has a conflict under ER 1.9(b), that conflict would not be imputed to his or her firm, and other members of the firm could undertake the representation so long as the former government lawyer is screened in accordance with ER 1.11(a). *Id.* at 1101:158.

CONCLUSION

The inquiring attorney may ethically personally represent clients in matters involving state agencies the inquiring attorney formerly represented so long as the following conditions are met: First, the matter for which a new client seeks representation is not one in which the inquiring attorney personally and substantially participated while employed by the Arizona Attorney General's Office. If so, the inquiring attorney can only represent the new client if the former government client consents to the representation. Second, the inquiring attorney does not possess confidential government information that could be used to the disadvantage of a party opposing the new client. Third, the representation of the new client will not require the inquiring attorney to use the former government client's confidential information. If so, the inquiring attorney can only represent the new client if the former government client consents. If the inquiring attorney is ethically precluded from personally representing the new client, the inquiring attorney's firm may represent the client so long as the inquiring attorney is screened in accordance with ER 1.11(a) and prompt written notice is provided to the inquiring attorney's former government client.

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[1] **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2002**

[2] Other state and federal laws also may impose restrictions on a former government lawyer's ability to represent clients in matters involving a government agency the lawyer formerly represented. *See* A.R.S. § 38-504(A); 18 U.S.C. § 207. An analysis of those statutes is outside our jurisdiction.

[3] The former government lawyer should also consider whether the representative of a private client creates an "appearance of impropriety." *See, e.g., Romley v. Superior Court*, 184 Ariz. 223, 227, 908 P.2d 37, 41 (App. 1995); *Turbin v. Superior Court*, 165 Ariz. 195, 199, 797 P.2d 734, 738 (App. 1990).

[4] The Comment to ER 1.11 notes that the firm need not "give notice to the government agency at a time when premature disclosure would injure the client," but that notice should be given "as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the [former government] lawyer is complying with ER 1.11 and to take appropriate action if it believes the lawyer is not complying." ER 1.11 Comment.

[5] ABA Model Rule 1.9(c) is the equivalent to Ariz. ER 1.9(b).